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10 VISION AIRLINES, INC.

E filed: August 23, 2010

8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF NEVADA**

10 \*\*\*\*\*

11 GERALD HESTER, on behalf of himself and  
12 all others similarly situated,

**CASE NO: 2:09-CV-00117-RLH-RJJ**

13 Plaintiff,

**DEFENDANT VISION AIRLINES,  
14 INC.’S OPPOSITION TO PLAINTIFF’S  
15 MOTION FOR SUMMARY JUDGMENT**

16 vs.

17 VISION AIRLINES, INC.,

18 Defendant.

19 VISION AIRLINES, INC. (“VISION”), by and through its attorney of record, HAROLD  
20 P. GEWERTER, ESQ., of the law firm of HAROLD P. GEWERTER, ESQ., LTD., respectfully  
21 submits Defendant VISION’S Opposition to Plaintiff’s Motion for Summary Judgment.

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This Opposition shall consist of this Preamble, the following Points and Authorities and the complete files and records of this action.

DATED this 23rd day of August, 2010.

HAROLD P. GEWERTER, ESQ., LTD.

/s/ Harold P. Gewerter, Esq.  
HAROLD P. GEWERTER, ESQ.  
Nevada Bar No. 499  
2705 Airport Drive  
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Attorney for Defendant  
VISION AIRLINES, INC.

## POINTS AND AUTHORITIES

I.

## FACTS

Defendant VISION has, since 2005, provided airline services to a contractor or subcontractor of a federal government entity. Plaintiff HESTER is a former VISION pilot who claims that Defendant VISION failed to give him specific sums of “hazard pay” allegedly required for flights into and out of Baghdad, Iraq and Kabul, Afghanistan.

Plaintiff HESTER does not allege that Defendant VISION breached any contract with him, or seek to recover as a third-party beneficiary of a contract between others. Nor does he suggest that Defendant VISION violated any state or federal wage-and-hour laws. Instead, Plaintiff HESTER contends that Defendant VISION was required to provide specifically-defined and separately-identified hazard pay simply because the United States Government allegedly intended its prime contractors to require downstream subcontractors to make such payments. But no subcontract to which Defendant VISION is or was a party ever required Defendant VISION to make any specific amount of hazard-duty-related payments. Nor did Defendant VISION's at-will compensation agreement with Plaintiff HESTER.

Because no law or contract creates such an obligation, Plaintiff HESTER fashions a handful of unjust enrichment-type claims, which he then wraps in the imagery of war and patriotic duty. Many of Plaintiff's allegations are fundamentally wrong. Plaintiff HESTER'S

1 rights and Defendant VISION's obligations were defined by contract. And where, as here, there  
 2 are valid and enforceable contracts, Plaintiff's equitable claims are unavailable as a matter of  
 3 law.

4 **BACKGROUND**

5 Defendant VISION hired Plaintiff HESTER in September 2006 to pilot flights into and  
 6 out of Baghdad and Kabul. (Plaintiff's Complaint, ¶ 1.) In consideration for his duties,  
 7 Defendant VISION offered Plaintiff HESTER a defined compensation package that Plaintiff  
 8 HESTER accepted.<sup>1</sup> Plaintiff HESTER does not contend that Defendant VISION failed to pay  
 9 him any agreed upon sum. Defendant VISION had similar agreements with other crew  
 10 members. Defendant VISION terminated Plaintiff's employment on or about August 4, 2008.

11 Plaintiff HESTER contends that he (and other VISION crew members) should have  
 12 received "hazard pay" for all flights originating or terminating in Baghdad or Kabul, *id.* at ¶¶ 6,  
 13 57, presumably in addition to the defined compensation package to which he had agreed.  
 14 Plaintiff HESTER grounds his "right" to receive "hazard pay" in the purported language of  
 15 certain contracts – contracts to which he was not a party and, in some cases, to which Defendant  
 16 VISION was not a party.

17 Plaintiff HESTER alleges that Capital Aviation, Inc. ("Capital") in 2004 contracted with  
 18 the U.S. Government to provide airline service into and out of Baghdad and Kabul. (*Id.* at ¶ 25.)  
 19 Thereafter, Capital subcontracted that service with Defendant VISION ("Capital Subcontract,"  
 20 attached hereto as Exhibit 1). (*Id.* at ¶ 28.) The Complaint alleges that the Capital Subcontract  
 21 required specific sums of "hazard pay" to be given to Defendant VISION employees. (*Id.* at  
 22 ¶ 30.)

23 The Complaint further alleges that in mid-2006 the U.S. Government changed primary  
 24 contractors and executed a contract with McNeil Technologies ("McNeil") with the same terms  
 25 as the Government's contract with Capital. (*Id.* at ¶ 51.) Like Capital, McNeil subcontracted the  
 26 service with VISION ("McNeil Subcontract," attached hereto as Exhibit 2). (*Id.*) Plaintiff

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27  
 28 <sup>1</sup> Hester's rate of compensation was materially above market to account for the risks  
 associated with flying into Iraq and Afghanistan.

1 HESTER maintains that the terms of the McNeil Subcontract were substantively the same as the  
 2 Capital Subcontract and that it too required Defendant VISION to make specific hazard duty  
 3 payments to its employees. (*Id.*)

4 The Capital and McNeil Subcontracts, however, show that Plaintiff's key allegations are  
 5 false.<sup>2</sup> The dispositive facts are as follows: (1) VISION never agreed with Capital or McNeil to  
 6 give Plaintiff HESTER specific hazardous duty payments over and above his regular  
 7 compensation; and (2) Plaintiff HESTER received all wages and benefits that he and Defendant  
 8 VISION agreed he would receive. For the reasons stated below, these facts support entry of a  
 9 full summary judgment in favor of Defendant VISION as a matter of law and a denial of  
 10 summary judgment in favor of Plaintiff.

11 \_\_\_\_\_  
 12 <sup>2</sup> For example:

- 14 • Plaintiff contends that the Government contracted directly with Capital.  
 15 (Complaint, ¶¶ 25-27.) But it actually contracted with Computer Sciences  
 16 Corporation, which then subcontracted with Capital. Vision was not a party to  
 either of these contracts.
- 17 • Plaintiff contends that the Capital and McNeil Subcontracts require specific  
 18 amounts of hazard pay. (Complaint, ¶¶ 30, 34-36, 51.) Neither, however,  
 19 mentions any specific sum of such payments to Vision employees. Under the  
 20 Capital Subcontract, Capital's payments to Vision were based on the number of  
 21 rotations flown per week. (See Exhibit 1.) Under the McNeil Subcontract,  
 22 McNeil paid Vision a fixed amount per flight and a variable sum to reimburse for  
 23 fuel costs. (See Exhibit 2.) The McNeil Subcontract nowhere even mentions  
 24 "hazard pay." (*Id.*)
- 25 • Plaintiff claims that in 2006 Vision contracted with McNeil to provide air  
 26 transport services under the same terms and conditions as the Capital Subcontract.  
 27 (Complaint, ¶ 51.) Vision, however, did not contract with McNeil until 2007,  
 28 and at that time it executed a new and different contract from the one it had with  
 Capital. (See 2 2.)

3 Cont.

- 26 • Plaintiff claims to know the contents of the agreements between the U.S.  
 27 Government and its prime contractors (here, CSC and McNeil). (Complaint,  
 28 ¶¶ 18-27, 51.) At least parts of these documents are "classified," however, so it  
 is very unlikely that Plaintiff ever saw them.

## **ARGUMENT**

# STANDARD FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper “where the record before the Court on the motion reveals the absence of any material facts and [where] the moving party is entitled to prevail as a matter of law.” *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 883 (9<sup>th</sup> Cir. 1982), cert. denied, 460 U.S. 1085 (1983) (quoting *Portland Retail Druggists Association v. Kaiser Foundation Health Plan*, 662 F.2d 641, 645 (9<sup>th</sup> Cir. 1981), cert. denied, 460 U.S. 1085 (1983). “A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties differing versions of the truth.” *Securities and Exchange Commission v. Seaboard Corporation*, 677 F.2d 1289, 1293 (9<sup>th</sup> Cir. 1982); *United States v. First National Bank of Circle*, 652 F.2d 882, 887 (9<sup>th</sup> Cir. 1981).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view all facts and inferences in the light most favorable to the responding party. *Adickes v. S.H. Dress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed. 142 (1970), *Zoslaw*, *supra*, 693 F.2d at 883; *Lessard v. Applied Risk Management*, 307 F.3d 1020 (9<sup>th</sup> Cir. Oct. 3, 2002); *Warren v. City of Carlsbad*, 58 F.3d 439 (9<sup>th</sup> Cir. 1995). Once this burden has been met, “[t]he opposing party must then present specific facts demonstrating that there is a factual dispute about a material issue.” *Zoslaw*, *supra* 693 F.2d at 883. The movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Thus, in order to preclude a grant of summary judgment, the non-moving party must set forth “specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct 1348, 89 L.Ed. 2d 538 (1986)(quoting Fed. R. Civ. P. 56(e)).

Given these statements regarding summary judgment and based on the facts and law discussed herein, it is clear Plaintiff HESTER cannot prevail on the claims included in his Complaint against this Defendant.

1 **PLAINTIFF'S EXPERT HAS NEITHER BEEN ADMITTED IN THIS CASE AND HIS**  
2 **CONCLUSIONS ARE INACCURATE**

3 Plaintiff HESTER bases his entire Motion for Summary Judgment on the report of its  
4 purported expert whose testimony in this case was deemed inadmissible by this Honorable Court  
5 due to untimely disclosure, and which status Plaintiff HESTER has made and remains itself the  
6 subject of a pending Motion. Thus Plaintiff's entire Motion for Summary Judgment fails as it  
7 has as its linch pin the "experts report". Further, even if such expert's report were to be  
8 admitted, Defendant VISION disagrees with its conclusions. Defendant VISION'S calculations  
9 show that the pilots and flight crew on these programs have been paid what they contracted for.  
10 It is also unclear how this purported expert is qualified to make the legal conclusions put forth by  
11 the Plaintiff HESTER as emanating from the purported expert. According to Plaintiff HESTER  
12 this purported expert has decided that legally Plaintiff HESTER was due "hazard pay", that  
13 legally they were not bound by their contracts, and apparently this purported accounting expert is  
14 to be deemed an expert in the doctrine of unjust enrichment not due to any expertise or  
15 background but because it is convenient for Plaintiff HESTER. Further, since Defendant  
16 VISION has had no opportunity to cross examine or challenge the findings of this un-admitted  
17 expert, such finding cannot be the basis for a Motion for Summary Judgment.

18 **DISCOVERY HAS PRODUCED ONLY EVIDENCE IN CONTRADICTION OF**  
19 **PLAINTIFF HESTER'S CLAIMS**

20 As part of the hearing on Plaintiff's Motion to Compel on October 23, 2009, this  
21 Honorable Court stated: "Sounds like one of the fastest ways to get their case is to just interview  
22 the person that's going to represent the class, Mr. Hester, the named class rep. That will nail a  
23 lot of this down." (Transcript page 114, Exhibit "3" attached hereto). The discussion regarding  
24 HESTER'S deposition continued:

25 MR. GEWERTER: Your honor, if my client is in a better position, then there is no case.  
26 My client says he got paid everything. Is that then an admission  
27 that he got paid everything if my clients records are correct?  
Obviously they are saying my client's records are not correct.

28 THE COURT: This is a question that would be much more easily handled in a  
deposition.

MR. GEWERTER: I'm sorry, your Honor.

1 THE COURT: I mean, you can see how you would have him sitting there in front  
2 of you. And you say you know, when you started was there a  
3 contract? How did you know what you were going to make?  
4 MR. GEWERTER: If I ask for a contract I'll get an objection that it's a legal  
5 conclusion. But I will go down that path though your honor.  
6 THE COURT: Well, there was some basis for him to be paid and what was the  
7 basis? I mean, he must have had some expectation. He didn't just  
8 one day walk on the flight line and start flying to Afghanistan for  
9 these people.

10 (Id. at 121.)

11 Therefore, pursuant to the Court's instructions, and in an effort to gain information  
12 regarding the basis for Plaintiffs' claims, on March 19, 2010, Defendant's counsel took the  
13 deposition of the lead plaintiff in this case Gerald Hester. The deposition of Plaintiff HESTER  
14 revealed, however, in no uncertain terms, that Plaintiff HESTER was paid exactly what he  
15 believed he was entitled to.

16 Q. (GEWERTER) And what was your compensation arrangement when you  
17 first became a pilot at Vision Airlines? (Page 11)  
18 A. (HESTER) I believe we were paid \$100 an hour, flight hour.  
19 Q. And that was what you were promised when you first came to work for Vision  
20 Airlines. Correct?  
21 A. That's what I was told the pay was.  
22 Q. Was that the pay you received?  
23 A. Yes.  
24 Q. Were you told anything other than a hundred dollars per hour when you first came  
25 to work for Vision Airlines?  
26 A. There was per diem.  
27  
28 Q. So you got a hundred dollars per hour for flight time. Correct? (Page 12)  
A. Yes.  
Q. Were you guaranteed a number of hours per month—  
A. No.  
Q. -- or just as needed?  
A. I'm sorry.  
We were not guaranteed a certain number of hours per month.  
...  
A. I didn't make an agreement. That's what it was.  
I was an at-will employee. (Page 12)  
Q. You acknowledge you were an at-will employee. Correct? (Page 13)

1 A. Yes.

2 Q. And you say you didn't make an agreement, but that's what was offered to you, a  
hundred dollars per hour, plus per diem. Correct?

3 A. Yes.

4 Q. And you accepted that pay structure. Correct?

5 MR. BUCKNER: Object to the form.

6 Q. (GEWERTER) You can go ahead and answer.

7 A. Yes.

8 ...

9 A. Because I'm over the age limit for 121 operations. (Page 23)

10 ...

11 Q. So you're aware as an experienced pilot that you are not able to work as a pilot, a  
line pilot, for a company that's 121 certified?

12 A. That's correct.

13 To be sure, Plaintiff HESTER unequivocally testified that he was an at-will employee  
14 with Defendant VISION, that he had a defined compensation package with Defendant VISION  
15 that he accepted, and that he received all moneys due and owing to him under those  
16 compensation packages. (Hester Depo., pp. 11-12, 45-47, 90-91, 113-114, 189, attached hereto  
17 as Exhibit "4.") ("The pay that was offered is, I believe the pay that I received."). Plaintiff's pay  
18 was set forth by contract. (See Exhibit "5") Plaintiff HESTER also unequivocally testified that  
19 he never told anyone at Defendant VISION that he thought he was being improperly  
20 compensated and he did not even think that he was improperly compensated until he was told  
21 that by his attorneys. (*Id.* at pp. 37-38, 48.) Instead, this case presented Plaintiffs' counsel with  
22 the opportunity to parade the ideas of patriotism and warfare in the public sphere in an attempt to  
23 gain notoriety for themselves.<sup>3</sup>

24 Q. When you were first hired, what was your promise for pay? (Page 45)

25 MR. BUCKNER: Object to the form.

26  
27 <sup>3</sup> Plaintiff HESTER testified that he never authorized his attorney to speak to the press about  
28 this case and reveal what the Company alleges is confidential information. (*Id.* at pp. 200-203.)

1 Q. Go ahead and answer, please.

2 A. \$100 an hour.

3 Q. So if I take a hundred dollars per hour, and multiply the number of hours here, I  
should then determine how much time and money you earned while at Vision  
Airlines? (Page 46)

4 A. Yes.

5 Q. Thank you.

6 Have you actually done that?

A. No.

7 ...

8 Q. As we sit there today, though, you have no evidence or facts that your direct  
deposits somehow were different than what you agreed to work for at Vision  
Airlines. Correct? (Page 47)

9 MR. BUCKNER: Object to the form.

10 THE WITNESS: The pay that was offered is, I believe the pay that I received.

11 Occasionally there were errors, and I submitted the corrections as  
requested.

12 ....

13 Q. What are these documents? (Page 48)

14 A. These are earnings statements.

15 Q. And you've seen these before. Is that correct?

A. Yes.

16 Q. Are these accurate?

A. Yes.

17 Q. Did you ever complain to anyone at Vision Airlines that you were not receiving  
what you promised to be received?

18 A. No.

19 ...

20 Q. So you were now guaranteed, whether you flew or not, as long as you were  
employed an annual salary of 40,000 a year based on this schedule. Correct?

21 MR. BUCKNER: Object to the form.

22 THE WITNESS: Yes.

23 BY MR. GEWERTER:

24 Q. And prior to November 1, 2007, in spite of the fact you were caught sleeping and  
acknowledged it, you had no guarantee of any minimum, did you?

25 MR. BUCKNER: Object to the form.

26 MR. GEWERTER: You can have a standing objection for every question I ask if you  
like.

27 MR. BUCKNER: If you're asking objectionable questions I'll object and make a  
record.

28 MR. GEWERTER: I think the objection is objectionable, but go ahead and answer.

THE WITNESS: Yes. (Page 86)

...  
Q. Is that what this grid says to you? (Page 86)

1 A. It – it established that there was a base pay.

2 Q. Plus you received an hourly pay, depending on which aircraft you flew. Correct?

3 ...

4 Q. Effective November 1, 2007, did you receive all compensation as set forth in this  
two-page document signed by you? (Page 90)

5 A. Yes.

6 ...

7 Q. Did you receive all money as set forth in this grid, on page 2? (Page 90)

8 MR. BUCKNER: Object to form. (Page 91)

9 THE WITNESS: I believe I was paid in accordance with that grid.

10 Q. Did you receive a base salary in accordance with this grid on page 2?

11 A. Yes.

12 Q. Did you receive an hourly salary in accordance with this grid on page 2 of this  
document marked Exhibit 44?

13 A. Yes.

14 Q. Do you have any knowledge whatsoever that you did not receive every penny of  
the base salary as set forth in this grid?

15 A. No.

16 Q. Do you have any knowledge whatsoever that you did not receive any money  
whatsoever for the hourly component of this grid on page 2 of Exhibit 44?

17 A. No.

18 As noted above, based on Plaintiff HESTER'S deposition testimony, he admits that he  
had an agreement to receive a certain specified wage and that he, in fact, received all wages due  
under that agreement. Apparently, based on the allegations in the Complaint, Plaintiff HESTER  
now believes that he is owed some sort of additional "hazard pay" over and above the amount he  
agreed to receive. However, based on his deposition testimony, it is clear that Plaintiff HESTER  
is not aware of a single alleged fact that forms the basis for his right to receive this additional  
compensation. As outlined below, when asked very specific questions regarding the factual  
allegations in this case, ***Plaintiff HESTER repeatedly stated that he did not provide that***  
***information to his attorneys, that he could not verify its accuracy, and that he has no idea***  
***where the information came from.*** For example:

25 • HESTER could not remember any specific individual that he spoke to at VISION  
26 regarding alleged "hazard pay." (*Id.* at pp. 35-37.)

27 • HESTER only believed he was entitled to "hazard pay" after he spoke with the attorneys  
28 in this case. (*Id.* at p.37-38.)

1 Q. <sup>4</sup> When did you first come to the conclusion that Vision had not paid  
2 you all the money you felt you were entitled to while working for  
3 Vision Airlines?

4 MR. BUCKNER: Object to the form.

5 Q. You can answer it.

6 A. When my attorneys discovered that was in fact the case.

7 Q. Well, how would you have a lawyer if you didn't know you had a case?

8 A. I didn't know if it were true or not.

9

10

11

- 12 • HESTER could not remember whether he was contacted by Plaintiffs' counsel or whether  
13 he contacted them. (*Id.* at pp. 38-39.)
- 14 • HESTER did not request to be lead plaintiff in this case, instead, Plaintiffs' counsel  
15 requested that he take that role. (*Id.* at pp. 41-42, 126.)
- 16 • HESTER does not know the amount at issue in the case for himself or for the class. (*Id.*  
17 at pp. 132-33.)

18 Q. Do you believe that amount in the class is significantly in excess of \$5  
19 million?

20 A. I don't know the amount at issue.

21 Q. In fact, it's a fair statement, when you filed this complaint, you have no basis,  
22 factual basis, to determine who much you are owed individually. Did you?

23 A. I did not.

24

25

- 26 • Despite, the colorful language in the Complaint regarding war ridden airports in Iraq and  
27 Afghanistan, Plaintiff HESTER has no information regarding military activity in those  
28 areas at the time of his employment with Defendant VISION. (*Id.* at pp. 139-152, 156-  
157)(noting, for example, that he did not supply the information regarding, and did not  
know the accuracy of, the fact that there was an alleged C-130 cargo plane crash in  
February 2005).
- 29 • In fact, Plaintiff HESTER admits that most of the information in the Complaint came  
30 from someone other than himself – someone that he could not identify and that his  
31 counsel would not let him identify on the basis of privilege. (*Id.* at pp. 133-134, 169.)

32 Q. But you provided facts to your counsel, though, didn't you?

33 A. About myself.

---

34 <sup>4</sup> Unless otherwise noted the Questions are asked by Harold Gewerter, Esq., attorney for  
35 Defendant VISION, and the Answers were provided by Plaintiff HESTER.

1 Q. Who else provided facts to the same law firm?

2 MR. BUCKNER: Object to form. Stop a second. You can answer the  
3 question if you know it without having gotten it from us. If you got it  
4 from a conversation from us, it's attorney-client privileged  
5 communication and I'm instructing you not to answer.

6 THE WITNESS: *You have to ask them. I don't know where they got their*  
7 *information.*

8 ...

9 Q. Well, somehow information got on this complaint that you allege did not  
10 come from you. Is that correct?

11 A. That is correct.

12 Q. Do you know where the information came from, which individuals?

13 A. I do not.

14 ...

15 Q. And paragraph 23, on page 8. Are you the source of that information?

16 A. No, I was not.

17 Q. Do you know who was?

18 A. No, I do not.

- 19 • HESTER confirmed on a number of occasions that *he does not know the accuracy of the*  
20 *factual information in the complaint* and instead simply "trusted his attorneys" that the  
21 information was true. (*Id.* at pp. 152, 158-159, 161-162, 166-67, 177-85.)

22 Q. You never actually researched this yourself, did you?

23 A. No, I did not. I'm guided by my attorneys, who I trust.

24 ...

25 Q. Look at paragraph 14. Did any of that information come from you?

26 A. No.

27 Q. Do you know whether or not that's true or false?

28 A. *I believe it to be true.*

Q. *And why do you believe it to be true?*

A. *Because I trust my attorneys.*

Q. *Is that where the information came from?*

A. *To the best of my knowledge, yes.*

...  
23

24 Q. Look at paragraph 16 on page 6 of the Complaint. It starts off by saying, "The  
25 United States government recognizes that employees of government  
26 contractors in Iraq and Afghanistan confront some of the same dangerous  
27 conditions encountered by government employees and members of the armed  
28 services." How do you know that the United States government recognizes  
that?

MR. BUCKNER: Object to the form.

THE WITNESS: *I'm not the source of this information. I believe it to be*  
true, and I rely on my attorneys for that.

...  
29

1 Q. And the next sentence, "Due to the United States government's reliance on  
2 contractors, the shortage of individuals willing to work in those countries  
3 threatens the government's ability to successfully implement its global  
4 defense strategy."  
5 How do you know that to be true?  
6 A. ***I was not the source of that information. I believe it to be true.***  
7 Q. Well, what do you know about—  
8 A. ***I rely on my attorneys.***  
9 Q. What do you know about the global defense strategy of the United States  
10 government?  
11 A. Are you speaking of the Bush Doctrine?  
12 Q. I'm not speaking of anything other than what's in your complaint. I didn't  
13 draft this, so I'm not the one responsible for the wordage.  
14 A. ***I didn't draft it either, sir.***  
15 Q. But you approved it, though.  
16 A. Yes.  
17 Q. Paragraph 18, on page 7. ***Did that information come from you?***  
18 A. ***No, it did not. ...***  
19 ...  
20 Q. Do you see where it says, "Hazard pay compensation is incorporated into a  
21 pass-through provision contained in the contract between the government and  
22 the contractor"? Is that a true statement?  
23 A. ***I wasn't the source of that information.***  
24 Q. Have you ever seen the contract between Vision Airlines and any other  
25 contractor or the United States government?  
26 A. No, I have not.  
27 Q. So you don't know whether or not there's a pass-through provision contained  
28 in any such contract, do you?  
29 A. ***No, but I believe it to be true, based on the research accomplished by my  
attorneys.***  
30 ...  
31 Q. So you don't know whether that \$2,500 figure and \$5,000 figure exists  
32 between the United States government and Capital Aviation, do you?  
33 A. ***No, I do not.***  
34 Q. Paragraph 27 on page 9. "In contracting with Capital Aviation from air  
35 transport services, the United States government incorporated the hazard pay  
36 into a pass-through provision of the contract." How do you know that to be  
37 true?  
38 A. ***I'm not the source for this information. I believe it to be true based upon  
information, belief and research accomplished by my attorneys.***  
39 Q. And then the next sentence says, "Because the employee hazard pay was  
40 incorporated into a pass-through provision, it required Capital Aviation to pay  
41 the hazard pay it received from the United States government to any  
42 subcontractor, who was required to pass those funds through to the air crews  
43 completing the work." Do you know if that's a true or false statement?  
44 A. Same answer, Mr. Grewerter.

1 Q. And what is that answer?  
2 A. *I wasn't the source of this information. I believe it to be true based upon the*  
*investigation done by my attorneys.*  
3 Q. Any other investigation, or just by your attorney?  
4 A. My attorneys.  
5 Q. Anyone -- anyone other than your attorneys?  
A. No.  
...  
6 Q. Later in that same paragraph, it says, "Moreover, Vision fired all the crew  
7 members that knew about or had previously received hazard pay for flying to  
8 Kabul and replaced them with employees who did not know that they were  
9 entitled to receive hazard pay." Who are those employees that were fired?  
10 A. I don't know.  
11 Q. How do you know this to be a true or false statement then?  
12 A. *I was not the source of this information.*  
13 ...  
14 Q. "In the summer of 2007, Dr. Dan Carson, Vision's director of flight  
15 operations contacted Capital Aviation and inquired if the United States  
16 government provided hazard pay for Vision's employees who were flying into  
17 Baghdad and Kabul." How do you know that to be a true statement?  
18 A. *I wasn't the source of this information.*  
19 ...  
20 Q. And then it says, "Dr. Carson contacted the president of Vision, William  
21 Acor, to discuss the hazard pay. During that conversation, Mr. Acor instructed  
22 Dr. Carson to cease his inquiries into the hazard pay issue." Now, who told  
23 you that?  
24 A. *I wasn't the source of this information.*  
25 Q. Okay. So you never heard that then?  
26 A. No.  
27 ...  
28 Q. You state in your lawsuit that, "This lawsuit seeks to end Vision's wrongful  
and exploitative conduct." Describe for me what you mean by that, please.  
A. *Again, I wasn't the source of the information here in this part of the*  
*complaint.*  
...  
Q. *You have no documents in your hand that verifies or backs up what you just*  
*said under oath, do you?*  
A. *I don't. I rely on information discovered by my attorney.*

- 25 • In perhaps his most telling admission of a lack of knowledge, *Plaintiff HESTER admits*  
26 *that he in fact has no personal knowledge whatsoever that anyone at Defendant*  
27 *VISION including himself was entitled to any sort of "hazard pay."* (*Id.* at pp. 159,  
162, 168-70, 178-85.)

1 Q. Then it says, "Accordingly, the United States government has extended the  
2 practice of paying hazard and imminent danger pay to employees of  
3 government contractors that work in Iraq and Afghanistan." How do you  
know that to be true?

4 A. Same answer.

5 Q. What is that answer?

6 A. ***I'm not the source of this information. I rely on my attorneys. I believe it to  
be true.***

7 Q. And you believe it to be true, but you have no independent knowledge, do you  
have?

8 A. ***I have no independent knowledge, but I trust my attorneys.***

9 ...

10 Q. How do you know in the second sentence of that paragraph, where it says,  
"Specifically the United States government provides the contractor with funds  
for the following: (1) the contracted services; and (2) hazard pay for the  
contractors' employees that work for Iraq and Afghanistan"?

11 A. ***I was not the source of that information. I believe it to be true, and I trust  
my attorneys.***

12 ...

13 Q. The second sentence, "Accordingly, if the contractor subcontracts with  
another company to perform the contracted services, the pass-through  
provision requires that the contractor 'pass through' the hazard pay that it  
collects from the United States government to the subcontractor; i.e., the  
contractor pays the subcontractor the hazard pay." And it goes on. Where did  
you learn that information from?

14 A. ***I am not the source of that information.***

15 Q. So for clarity, have you ever seen any contracts between Vision and any other  
government contractor?

16 A. No, I have not.

17 ...

18 Q. And looking at paragraph 24 on page 8. Look at the third line, where it says,  
"Accordingly, the United States government has standardized the amount of  
hazard pay that crew members on the flights to Baghdad and Kabul receive  
for every takeoff and landing. Specifically, every captain, first officer,  
international relief officer receives \$2,500 each for every takeoff and landing  
at these airports in Baghdad and Kabul, making a total of \$5,000 in hazard pay  
per round trip." Is that a true statement?

19 A. ***I was not the source of that information.***

20 Q. Do you know who was?

21 A. I do not.

22 ...

23 Q. Look at paragraph 30 at the bottom of the page. "In addition, Capital Aviation  
provided Vision the hazard pay that the United States government gave  
Capital Aviation for the benefit of Vision's employees, which Vision was  
required to distribute to those crew members on the flights to Baghdad and

1 Kabul." Do you know if that's a true or false statement?

2 A. ***I was not the source of that information. I believe it to be true based on the***  
***research done by my attorneys.***

3 ...

4 Q. Look at paragraph 36 on page 11. "Accordingly, Capital Aviation provided  
5 Vision with a minimum of \$54,000 per week in hazard pay meant for Vision's  
6 employees." How do you know that money was meant for Vision employees?

7 A. ***I'm not the source of this information. I believe it to be true, based on the***  
***investigation of my attorneys.***

8 ...

9 Q. Look at paragraph 38 on page 11. "In August 2005, Vision decided that it  
10 would capture a financial windfall if it simply retained all the hazard pay it  
11 collected from Capital Aviation for its own benefits." What information do  
12 you have that Vision obtained a financial windfall?

13 A. ***I was not the source of that information.***

14 Q. What information do you have that Vision received any hazard pay they  
15 collected—I'm sorry, what information do you have that Vision received any  
16 hazard pay?

17 A. ***I'm not the source of this information.***

18 ...

19 Q. What information do you have personal knowledge of in this complaint?

20 A. The information concerning myself.

21 Q. And that's it, then?

22 A. That's it.

23 Q. Nothing about the contract between Capital and Vision. Correct?

24 A. Correct.

25 Q. ***And nothing about hazard pay. Correct?***

26 A. ***Correct.***

27 Based on the foregoing, it is without question that the lead plaintiff in this case possesses  
28 no information or knowledge regarding the material facts that form the basis for the Complaint in  
this case, ***including no information whatsoever on hazard pay,*** and that the true individuals  
with information or knowledge about the claim are, if anyone, apparently his lawyers. (See, e.g.,  
*id.* at p. 227) ("***I did not file the complaint, and I wasn't the source for the information.***")

29 Further, throughout the entire course of a thorough discovery process, Plaintiff HESTER  
30 has failed to produce or discover any document or contract requiring the payment of specifically-  
31 defined and separately-identified hazard pay.

**SUMMARY JUDGMENT FOR PLAINTIFF HESTER SHOULD BE DENIED AS TO  
COUNTS I, III, IV AND V OF THE COMPLAINT BECAUSE THE PARTIES'  
RIGHTS AND OBLIGATIONS ARE DEFINED BY CONTRACT.**

Under Nevada law, equitable causes of action for unjust enrichment, money had and received,<sup>5</sup> and quantum meruit are unavailable when a valid agreement exists between the parties. *See Thorne v. Wagner*, 2007 US Dist. LEXIS 10750; 2007 WL 496373 (D. Nev. Feb 13, 2007) (dismissing the plaintiff's unjust enrichment claim because "no agreement can be implied when there is an express agreement"); *Trustees of the Operating Engineers Pension Trust v. Tab Contractors, Inc.*, 224 F.Supp.2d 1272, 1278 (D. Nev. 2002) (same); *Sack v. Tomlin*, 110 Nev. 204, 208, 871 P.2d 298, 302 (1994) (noting that the doctrine of quantum meruit applies only "to an action for restitution involving work and labor performed...in the absence of an agreed upon amount").

Moreover, “an employee who has been paid his agreed wages [can]not claim additional compensation in quantum meruit to prevent his employer’s supposed ‘unjust enrichment.’” See *Ewing v. Sargent*, 87 Nev. 74, 80, 482 P.2d 819, 823 (1971) (citing *Keith v. Kottas*, 119 Mont. 98, 100, 172 P.2d 306, 307 (1946)) (“holding that services rendered by an employee are presumed compensated for by the stipulated wage, that to overcome this presumption he must prove an express contract for additional compensation and that no implied contract can be posited in such a situation.”)(emphasis added).

Similarly, a claim for conversion requires Plaintiff HESTER to prove that Defendant VISION exercised control over property that was rightfully his. *See Wantz v. L.V. Redfield*, 74 Nev. 196, 198, 326 F.2d 413, 414 (1958). But Plaintiff HESTER cannot establish any right to “hazard pay” without interpretation of the contracts and a determination that the contracts were breached.

5 A claim for “money had and received” is duplicative of a claim for unjust enrichment and, therefore, should be dismissed on the same grounds. *See* 66 Am. Jur. 2d Restitution and Implied Contracts § 172 (2008) (attached hereto as Exhibit 6).

1       Here, the parties agreed that Plaintiff HESTER would work as a pilot for Defendant  
 2 VISION in return for certain fixed compensation. This agreement constituted a valid  
 3 compensation contract. *See Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 777 P.2d 366, 369  
 4 (1989) (“Employment ‘at-will’ is a contractual relationship and thus governed by contract law.”)  
 5 Moreover, neither the Capital Subcontract nor the McNeil Subcontract required the payment of  
 6 any “hazardous duty” sum. For these reasons, Plaintiff HESTER’S claims for unjust enrichment,  
 7 money had and received, quantum meruit, and conversion should have the entry of an order  
 8 denying summary judgment.

9       **SUMMARY JUDGMENT FOR PLAINTIFF HESTER SHOULD BE DENIED AS TO**  
 10       **COUNTS II, VI AND VII BECAUSE THEY ARE REMEDIES WHICH FAIL**  
 11       **BECAUSE THE SUBSTANTIVE CAUSES OF ACTION FAIL.**

12       The Complaint asserts as separate causes of action three (3) types of equitable relief –  
 13 constructive trust, injunctive relief, and declaratory judgment. These are remedies, not separate  
 14 claims. *See State Farm Mut. Auto. Ins. Co. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176,  
 15 178 (1993) (“It is axiomatic that a court cannot provide a remedy unless it has found a wrong.  
 16 ‘[T]he existence of a right violated is a prerequisite to the granting of an injunction.’”); *Knittle v.*  
 17 *Progressive Cas. Ins. Co.*, 112 Nev. 8, 10, 908 P.2d 724, 725 (1996) (to obtain a declaratory  
 18 judgment, Plaintiff must prove that he has a legally protectable interest in controversy); *Crockett*  
 19 *& Myers, Ltd. v. Napier, Fitzgerald, & Kirby, LLP*, 440 F.Supp.2d 1184, 1197 (D. Nev. 2006)  
 20 (“a constructive trust is ‘a remedial device by which the holder of legal title to property is held to  
 21 be a trustee of that property for the benefit of another who in good conscience is entitled to it.’”).

22       6

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23  
 24       6       To succeed in his claim for a constructive trust, Plaintiff also must prove that he and  
 25 Vision had a confidential relationship. Plaintiff suggests that such a relationship flowed from his  
 26 employment alone. But he is wrong as a matter of law. “No presumption of a confidential  
 27 relationship arises from the bare fact that parties to a contract are employer and employee;  
 28 rather, additional ties must be brought out in order to create the presumption of a confidential  
 relationship between the two.” *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir.  
 2004) (*citing Odorizzi v. Bloomfield Sch. Dist.*, 246 Cal. App. 2d 123, 54 Cal. Rptr. 533 (1996)).

1 As shown above, Plaintiff HESTER cannot prove a violation of any right, or injury to any  
2 legally-protectable interest. For the same reasons that summary judgment for Defendant should  
3 be entered in the four (4) substantive Counts, the three (3) remedial Counts should have  
4 summary judgment denied as to Plaintiff.

5 **III.**

6 **CONCLUSION**

7 For the foregoing reasons, Defendant VISION respectfully requests this Court to Deny in  
8 its entirety Plaintiff HESTER'S Motion for Summary Judgment.

9 DATED this 23<sup>rd</sup> day of August, 2010.

10 HAROLD P. GEWERTER, ESQ., LTD.

11 */s/ Harold P. Gewerter, Esq.*

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